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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1956

JACK C. MASSENGALE

Petitioner.

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

The petition of Jack C. Massengale respectfully shown to this Honorable Court:

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit appears in 240 Fed. 2d, p. 781, and appears at page 27 of the separate appendix to this petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on February 11, 1957, appendix page 26 and the petitioner's application for re-hearing was denied on March 22, 1957. On April 10, 1957, this court granted an extension of time within which to petition for certiorari to and including May 21, 1957.

The Supreme Court of the United States has jurisdiction of this proceeding under Title 28, Section 1254 (1) and Revised Rules of the Supreme Court, Number 19.

SUMMARY STATEMENT OF THE MATTER INVOLVED

This was a criminal action which was brought by the United States of America against Jack C. Massengale, Petitioner, for the causing of a telephonic communication between Wanda Emmich and Thomas Keene, also a telephonic communication between Gladys Moorman and Albert Mullin, to be intercepted and divulged, contrary to 47 U.S.C. Section 605, in violation of 47 U.S.C., Section 501, and is based on Indictment Number 8874, count 5, and Indictment 8875.

Jack C. Massengale, who is an attorney-at-law, and was an officer of the Federal Detective Bureau, Inc., an Ohio corporation, did allegedly cause an employee of the Cincinati & Suburban Bell Telephone Company to "tap" the telephone of one Wanda Emmich, and disclosed the information from said telephone "tap" to one George Emmich, Jr., and David Goldman, and other persons unknown. It is admitted by the government's own witness, George Emmich Jr., that he, George Emmich, Jr., authorized said "tap", (p. 81aR), under the belief that the phone in question belonged to him, as he was paying the expenses of his wife, Wanda Emmich, including the telephone bill.

It is further admitted by a government witness, one Gene Bramel, a Federal Narcotics agent (p. 110aR), that he worked on said "tap", and at the time of doing said work, he was still in the employ of the United States Federal Narcotics office in Cincinnati, and that he was not

doing any work for the petitioner at that time, and was not paid by the petitioner.

It is admitted by the government that the petitioner, Jack C. Massengale, did not personally make any telephone "tap."

It is further admitted that the petitioner, who is an attorney, researched the Ohio law with other Ohio attorneys, and informed the parties who allegedly made the "tap" that it was legal to do so. It is further admitted that the parties who allegedly made the "tap" were an employee of the Federal Detective Bureau, Inc., and of the Cincinnati & Suburban Bell Telephone Company, and not employees of the petitioner.

It is further charged in Indictment 8875 that the petitioner intercepted communications to and from Gladys Moorman, and did divulge the contents of said intercepted communications to Irma Starbird, Col. Henry Sandman, and Kyle Brooks. It is admitted by the government's own witness (p. 137aR), that a Cincinnati city detective and Gladys Moorman were planning to dispose of Mrs. Moorman's husband. It is further admitted that the husband of Irma Starbird made said telephone "tap" and recordings after the petitioner checked the Ohio law, and informed him that it was legal to do so. It is also admitted by the government's witness that he (p. 136aR), and not the petitioner, arranged for the playing of the recording for Col. Sandman of the Cincinnati Police Department.

The question presented here, which has never been decided by the Supreme Court of the United States, is whether the petitioner, a practicing attorney, can be legally charged and convicted of the crime of intercepting and disclosing communication contrary to 47 U.S.C. Section 605, in violation of 47 U.S.C. section 501, when it is admitted by the

government's own witnesses that he did not personally do the acts complained of, but that he told others it was legal to do so, and that the other people, relying on the advice of this petitioner attorney, did the acts, and said acts took place in the City of Cincinnati, State of Ohio, and it was and is now believed by this petitioner that there was no interstate connection which would be violative of the Federal Law.

It is further admitted by the government's own witness, an F.B.I. agent (p. 321aR) that the petitioner had contacted him and stated he had researched the law, and could find no law against "wire tapping", and said F.B.I. agent admitted that he did not know of any law against it.

QUESTIONS PRESENTED

Where the acts of an attorney sanctioning a wire "tap" after first checking the criminal statute of the state of Ohio with several other attorneys, and finding no law against wire tapping, and then in addition to that, notifying the Federal Bureau of Investigation, and the F.B.I. agents also stating that they knew nothing of a legal violation, and then the attorney telling an employee of the Federal Detective Bureau, Inc., and the Cincinnati & Suburban Bell Telephone Company that it was legal to do the act, is there a willful violation of the law by the said attorney when he performs no overt act? Can there be a violation of the law of this type without an intent? This petitioner thinks not. Also, where the trial judge does not give the defendant a chance to be heard, as shown on p. 348aR, there is no valid conviction:—

The Court: "What, if anything, have you to say before sentence is pronounced?" The defendant, Jack C. Massengale: "The only thing I have to say—". The court broke in

at this point, and did not give the defendant a chance to be heard, and then stated: "Mr. Lester, you may speak." Under those circumstances, isn't the conviction and sentence void? This petition has found many cases which state that under those circumstances, there can be no legal conviction to stand.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

47 U.S.C.A. 605 — No person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person.

United States Constitution Articles IV, Section 2 and Amendments 6, 8, 9 and 10.

STATEMENT

Petitioner is a practicing attorney-at-law, residing and doing business in the state of Ohio, and was also an officer of the Federal Detective Bureau, Inc., an Ohio corporation.

The petitioner, in cooperation with several other Ohio attorneys, researched the Ohio law and found nothing against "wire tapping," and relying on his research and the opinion of the other attorneys and agents of the F.B.I., he told an employee of the Federal Detective Bureau, Inc., and the Cincinnati & Suburban Bell Telephone Company that it was legal to tap the telephone wires of one Wanda Emmich and Gladys Moorman, and the same was done. It is purported that the petitioner had this done and disclosed the contents of these intercepted messages. The

court below took jurisdiction of the case on the basis that the Federal Court has a right to try a case of this type, even though it was not involving interstate commerce, because it was an act which could have been done over an interstate wire, and the same telephone lines could have been used in interstate commerce.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

The United States Court of Appeals for the Sixth Circuit had decided an important question of federal law which has not been, but should be, settled by this court.

Since *Weiss* v. *United States* (1939), 308 U.S. 321, 84 L. Ed. 298, 60 S. Ct. 269, it must be conceded that 47 U.S.C., Section 605, prohibits the use in evidence of telephonic communications intercepted without authority of the sender, and that such prohibition extends not only to interstate, but also intrastate communication of this character. But this is at most only a rule of evidence as expounded in *Weiss* which had no occasion to discuss or decide the validity of the second clause of the statute creating a substantive offense in this language:

> "and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communications to any person."

At page 329 of the U. S. Report the court held the broad and inclusive language of this clause of the section not to be limited by construction so as to exclude intrastate communications from the protection of interception and divulgence. In *Weiss* the communications were by telephone.

But the quoted clause of the section is not limited to telephonic communications, either interstate or intrastate. It purports to apply to any and all communications of any nature whatsoever. It is so broad that it conceivably would condemn as a crime the interception of a written message sent by messenger from one to another within a state if the messenger opened the envelope containing the message without permission of the sender and divulged its contents to a third person.

The language of the clause could condemn as a criminal the meddlesome Mattie who might surreptitiously eavesdrop on the rural multi-party line telephone of the typical Lum an' Abner variety and then blab what she heard to her husband or neighbors. And this even though the telephone line be only between one mountain ridge and the general store up a near-by creek and wholly unconnected to any interstate phone system.

It could also condemn the unauthorized interception and divulgence of communications accomplished wholly over a purely intrastate office communications system or a phone system connecting only a farmer's dwelling house with his barn.

The implications of the pertinent clause of the statute are too broad and all inclusive and would, if carried to a logical conclusion, violate the constitutional prohibition against abridging the freedom of speech.

Count 5 of Nos. 8874 and 8875 do not state offenses, because the statute upon which they are based, or upon which their sufficiency depends, is a Congressional act attempting to regulate purely local matters, and is beyond the scope of granted Congressional powers, and impinges upon the first amendment to the Constitution of the United States. Such was the holding in *United States* v. *Dickey*

(1924), 3 Fed. 2d 190, affirmed 268 U.S. 378, 69 L. Ed. 1006, 45 S. Ct. 588, where the court held bad on demurrer an indictment charging an illegal publication of federal income tax returns.

Criminal Law 394 — Evidence obtained by wire tapping is inadmissible when consisting of interstate or foreign communications. Communications Act of 1934, 6-5, 47 U.S.C.A. 605.

U. S. v. *Bonanzi*, Feb. 7, 1938 (No. 68) Circuit Court of Appeals, 2nd Circuit, Criminal Law Key 1169(2) — Evidence obtained by wire tapping is inadmissible if part of interstate communication. Communications Act 1934, 605 Stat. 1064, 1103, 47, U.S.C.A.

Criminal Law Key 394 — Assuming that the Statute prohibiting the interception of telephone communications does not apply to intrastate communications, it is necessary to render evidence obtained by wire tapping competent to show the intrastate character of the communication, and the burden is on the party offering the evidence. Communications Act 1934, 605, 48 Stat. 1064, 1103, 47 U.S.C.A. 605.

Columbia Law Review, vol. 52, 1952, pages 193 and 194, in matter of *Harlem Check Cashing Company* v. *Bell*, the N.Y. Court of Appeals upheld disclosure in court of information obtained in accordance with this Statutory Procedure. The court stated that Section 605 of the Federal Communications Act was not intended as a check upon a state's police power, therefore it did not bar New York for authorizing wire tapping. The New York system has not been authoritatively passed on by the United States Supreme Court, despite its recent decision in *Stemmer* v. *New York*.

This decision gives the definite implication that there is

no violation if there is an interception of an intrastate message.

Underhill's Criminal Evidence, 5th edition, Herrick, p. 42 — It is well settled that each essential element of a crime must be proved beyond a reasonable doubt before the accused can be convicted.

Davis v. *United States*, 160 U.S. 469, 40 L. Ed. 499, 16 Sup. Ct. 353;
Christoffel v. *United States*, 338 U.S. 84, 93 L. Ed. 1826, 69 Sup. Ct. 1447.

Where specific intent is required to make an act criminal, the burden is on the state to prove such intent beyond a reasonable doubt.

Jones v. *State*, 159 Ark. 215, 251, S.W. 690;
California v. *Ramirez*, 64 Cal. App. 358, 221 Pac. 960;
People v. *Wells*, 33 Cal. (2d) 330, 202 Pac. (2d) 53;
Severin v. *State*, 146 Nebr. 506, 20 N.W. (2d) 377;
State v. *Walsh*, 9 N.J. Super 43, 74 Atl. (2d) 613;
People v. *Fruci*, 188 Misc. 384, 67 N.Y.S. (2d) 512.

Southerland Statutory Construction, Vol. 3, p. 5 — The rule that penal statutes are strictly construed established a requirement of definiteness which must be met by the legislative draftsman. Thus it is not uncommon to find penal statutes declared void for indefiniteness.

Kinnane v. *Detroit Creamery Co.*, 255 U.S. 102, 65 L. Ed. 531, 41 Sup. Ct. 304 (1921);
People v. *Pace*, 73 Cal. App. 548, 238, Pac. 1089 (1925);
Moore v. *Vincent*, 174 Okla. 339, 50 P. (2d) 388 (1935).

The words of the criminal statute must be such as to leave no reasonable doubt as to the intention of the legis-

lature, and where such doubt exists the liberty of the citizen is favored.

U. S. v. *Corbett*, 215 U.S. 233, 54 L. Ed. 173, 30 Sup. Ct. 81 (1909);
Croswell v. *People*, 74 Colo. 547, 223 Pac. 51 (1924);
State v. *Levy*, 103 Conn. 138, 130 Atl. 96 (1925);
People v. *Mueller*, 352 Atl. 124, 105 N.E. 239 (1933);
In re Merrill, 88 N.J. Eq. 261, 102 Atl. 400 (1917);
Wilson v. *State*, 117 Tex. Crime 63, 36 S.W. (2d) 733 (1931);
Buzzard v. *Commonwealth*, 134 Va. 641, 114 S.E. 664 (1922).

The proper administration of justice and the protection of society against criminals imperatively require that persons should be encouraged in performing their duty, incumbent upon all, of communicating to the proper officials information which they may possess regarding the commission of a crime.

Miller on Criminal Law — Hornbook Series Sec. 14 — Act and Intent — the two elements of crime. Every common-law crime consists of two elements — the criminal act or commission and the mental element commonly called "Criminal Intent". Intent is the particular state of mind, differing in different crimes, which is required by the definition thereof, to exist in concurrence with the criminal act.

The full definition of every crime contains, expressly or by implication, a proposition as to a state of mind. Therefore, if the mental element of any conduct alleged to be a crime is proved to have been absent in any given case, the crime so defined is not committed. Negligence is never sufficient to supply specific intent.

U. S. v. *Moore*, Fed. Cas. 15, 803;
People v. *Von Tiedeman*, 120 Cal. 128, 52, p. 155;
People v. *Devine*, 95 Cal. 227, 30, p. 378;
People v. *Brown*, 74 Cal. 306, 16 P.I. CF (1927) 6 N.C.L. Rev. 95.

In prosecution for selling an automobile at over ceiling price, where general charge did not cover the question of good faith, refusal to charge that acquittal was necessary if defendant acted innocently or inadvertently, was prejudicial error.

Horsley v. *U. S.* C.C.A. 5th (1947) 160 Fed. 43.

The Court of Appeals for the District of Columbia holds that failure of the trial court to ask the defendant if he desires to make a statement is reversible error.

Gadsten v. *U. S.* 1955, 223 Fed. 627, 96 U.S. App. D.C. 162.

Amendment VI to the Constitution of the United States:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment VIII:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Amendment X:

The powers not delegated to the U. S. by the Constitu-

tion, nor prohibited by it to the States, are reserved to the states respectively, or to the people. Some provisions, however, are considered as "progressive". Thus the Eighth Amendment, prohibiting cruel and unusual punishment "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by humane justice."

Section 605 of Title 47, United States Code, insofar as they encroach upon the police powers of the states, are unconstitutional.

Weems v. *United States,* 217 U.S. 349.

In determining whether a punishment is cruel and unusual, the court should consider the punishment of the same or similar crimes in other parts of the United States, as exhibiting the difference between power unrestrained and that exercised under the spirit of constitutional limitations formed to establish justice.

Where a statute fixes a minimum penalty but gives the court or jury a discretion to go beyond it, such discretion must be exercised in reason, and justice, and in subordination to the constitutional provision prohibiting cruel and unusual punishment.

State v. *Baker,* 3 S. Dak. 2941.

Ordinarily a punishment within the limits prescribed by statute is not cruel and unusual, as the sentence is within the trial court's discretion. However, a punishment even with statutory limits which is out of all proportion to the gravity of the offense is cruel and unusual.

Weems v. *U. S.,* 217 U.S. 349.

There is a recent case decided by the United States Federal Court in New York, in the case of the *United States* v. *Charles V. Gris,* Crim. No. C 150-241, where the defendant

was only sentenced to thirty days in a wire "tap" case. (In the petitioner case he was given two one-year terms to run consecutively and a fifteen hundred dollar fine.)

No principle of the common law is better settled or more generally applicable than the principle that an act is not a crime if the mind of the person doing the act is innocent. A wrongful act and a wrongful intent must concur.

Reg. v. *Tolson*, 23 A. B. Div. 168, Beale's Cas 286, Mikell's Cas 134, 178, Levet's Cas, Cro Cas 638, 1 Hale P.C. 474, Beale's Cas 286;
Chisholm v. *Doulton*, 22 O.B. Div. 736;
Gordon v. *State*, 52 Ala. 308, 23 AM Eep 575;
Birney v. *State*, 8 Ohio 230, Beale's Cas 303;
Duncan v. *State*, 7 Hump (Tenn.) 148;
People v. *Welch*, 71 Mich. 548, 392 W. 747;
Comm. v. *Weiss*, 139 Pa. 247, 21 Atl. 10, 23 Am. St. Rop, 182, Mikell's Cas 205;
State v. Snyder, 44 Mo. App. 249,

and numerous cases more specifically cited under Clark and Marshall "The Law of Crime", p. 78.

It is a sacred principle of criminal jurisprudence, said the Tennessee court, that the intention to commit the crime is of the essence of the crime, and to hold that a man shall be held criminally responsible for an offense of the commission of which he was ignorant at the time, would be intolerable tyranny. It is because of this principle, as we shall presently see at some length, that the law does not punish children of tender age and insane persons, who by reasons of their mental incapacity, are incapable of understanding the nature of their acts, or of distinguishing between right and wrong, persons acting in good faith and without negligence under a mistake of fact, and persons acting under necessity or compulsion.

Duncan v. *State*, 7 Humph (Tenn.) 148.

Failure to allege specific intent has been held to invalidate an indictment.

State v. *Quinn*, 136 La. 435, 67 So. 206 (1915).

Clark and Marshall's "Law of Crime", p. 115:

Justification, in general — There are some circumstances under which an act which would otherwise be a crime is justifiable. In such a case no crime at all is committed. The grounds which have been relied upon as constituting justification, and which may or may not justify, according to the circumstances are:

1. Public Authority
2. Domestic Authority
3. Prevention of offenses — May the court take notice of the fact that the U. S. Narcotic office was called in on one "tap" and the Cincinnati Police Department on the other "tap". Both taps were done to prevent offenses or to catch the parties who were planning a violation of law — mainly murder and the sale of narcotics.

Many courts have held that solicitation to commit a misdemeanor is not indictable at all.

Smith v. *Comm.*, 54 Pa. 209, 93 AM Dec. 696;
Comm. v. *Willard*, 22 Pick (Mass.) 476.

In every crime of public offense there must exist a union of intent and act of criminal negligence.

People v. *Sheffield*, 108 Cal. App. 721, 293, page 72, 177.

Any interest, bias, prejudice or anger of witnesses should have been brought to the attention of the jury by way of instructions to the jury.

Emery v. *State*, 101 Wis. 627, 78 N.W. 145.

P. 80 — To constitute a crime, the act must be one which the party is able to know in advance is criminal, and its criminality cannot be made to depend on whether a jury may think is within or without the statute.

Wabash Ry. Co. v. *O'Bryan*, 285 F 583.

P. 86, D.C. Mo. 1931 — Policy of law is not to make innocent act criminal, in absence of wrongful purpose or intent.

U. S. v. *Brunett*, 53 F 2d 219.

P. 86, App. D.C. 1914 — Where an act by statute made a crime, the statute is to be construed in the light of common law, and the existence of a criminal intent is essential.

Masters v. *U. S.*, 42 App. D.C. 350, Amer. Cas 1916 A, 1243.

P. 94, App. D.C. 1939 — "Justification" sufficient to offset wilfulness may mean a sufficient lawful reason for acting or failing to act, and "justification" may also be based on a mistake of fact, where mistake is reasonable and fact would have constituted justification if accused had not been mistaken.

Townsend v. *U. S.*, 95 F 2d 352, 68 App. D.C. 223, certiorari denied 58 S.Ct. 830, 303 U.S. 664, 82 L. Ed. 1121.

The Department of Justice itself uses wiretapping and has generally declined to prosecute public officers or private persons accused of doing likewise since as reported in one instance, "the department could not in good conscience prosecute the wiretappers because the federal investigators had themselves used wiretapping." In the summer of 1950, when public opinion forced the department of justice to proceed against persons guilty of wiretapping in

the District of Columbia, the grand jury failed to return an indictment.

Columbia Law Review, p. 183, vol. 52.

Disclosure is expressly forbidden by only two states, the rest allow wiretap information to be used at will or in the courts, or exempt public officers.

Page 183 — In New York, a subscriber had two detectives tap his telephone line to secure information concerning his wife's fidelity. The Appellate Division reversed the conviction below, holding that the New York wiretapping provision was "designed to protect the right of privacy of participants to a telephone conversation, but went on to say that the subscriber could still personally authorize a "tap" to vindicate (his) paramount rights" — Among which the court noted business affairs, social relations and marital status. It rejected the idea that the telephone companies could, by approval or disapproval, either legalize or make criminal acts within the scope of the New York statute.

Page 185, Columbia Law Review, Vol 52 — California has also interpreted Sec. 605 as intended to regulate the activities of officers and courts of the Federal Government, and not the states.

Page 187, Columbia Law Review, Vol. 52 — It is argued that the law allows such "dirty" business as eavesdropping, searches and seizures, police informers and spies — wire tapping is merely one more of the many weapons, not all of which can be polite and morally immaculate, employed in the constant effort to protect society. Criminals, after all, utilize science to the fullest in their schemes. Law officers should be permitted equally to do so.

Columbia Law Review, vol. 52, 1952, pages 172 and 173 — Federal Legislation and Court decision — *Olmstead* v.

U. S. section 605 — In 1928, on the leading wire tapping decision of *Olmstead* v. *U. S.*, the Supreme Court held that wire tapping is not an unconstitutional search and seizure. The Fourth Amendment, said the court, protects only "tangible material effects" and "actual physical invasion," therefore it refused to apply the Amendment to "projected voices." After this landmark ruling, the legal status of wire tapping was easily defined. It was neither unconstitutional or a federal crime, and evidence obtained by intercepting telephone conversations was admissible in the Federal Courts, regardless of state laws which might make wire tapping an offense.

Wire tapping evidence was admitted in the following cases:

Beard v. *U. S.*, 82 F 2nd 837 (D.C. Cir.) cert. denied, 298 U.S. 655 (1936);
Bushbuse v. *U. S.*, 67 F 2nd 843 (6th Cir. 1933);
Foley v. *U. S.*, 64 F 2nd 1 (5th Cir.) cert. denied, 289 U.S. 762 (1933);
Marton v. *U. S.*, 60 F 2nd 696 (7th Cir.) cert. denied, 288 U.S. 607 (1932);
Kerns v. *U. S.*, 50 F 2nd 602 (6th Cir. 1931);
Dowdy v. *U. S.*, 46 F 2nd 417 (4th Cir. 1931).

5th Decennial Digest, vol. 41, 1936 to 1946, page 2429, *Kelly* v. *State of California*, 64 S. Ct. 527, 321 U.S. 802, 88 L. Ed. 1089. The provisions in Federal Communications Act of 1934 provided that no person not authorized by sender shall intercept or divulge contents of communication to any person, and that no person not entitled thereto shall receive any intercepting communication by wire or radio, does not extend to intrastate telephonic conversations, and it is only when an intrastate communication gained by tapping telephone wires is offered in a federal court that

such communication is inadmissible. Communications Act 1934, 605 U.S. C.A. 605, *People* v. *Kelly*, 122 P. 2d 655, subsequent opinion 137 P. 2d 1, 22 Cal. 2d 169, appeal dismissed. *Kelly* v. *State of Cal.*, 64 S. Ct. 264, 320 U.S. 715, 88 L. Ed. 420, rehearing denied 64 S. Ct. 527, 321 U.S. 802, 88 L. Ed. 1089.

Criminal Law 394 — Telegraphs - Telephones. The first and third clauses of statute regarding the divulging of interstate and foreign communication by wire or radio constitutes a part of regulation of the carriers and also a rule of evidence since the divulging of such communication by employees of communication agencies might place a great burden on interstate commerce. Communications Act of 1934, 605 U.S.C.A. Const. Act. 1, 8 d.e.

U.S.C.A. constitution 1 to 13, page 419 — Any legislation of congress beyond the limits of the powers delegated is an invasion of the right reserved to the states or to the people, and is necessarily void. Matter of Pacific R. Comsion, C.C. Cal. 1887, 32 F 241.

The government of the U. S. is one of the delegated and limited powers; it derives its existence and authority altogether from the constitution, and neither of its branches, executive, legislative nor judicial, can exercise any of the powers of government beyond those specified and granted; for this amendment, in express terms, provides that "the powers not delegated to the U. S. by the constitution, nor prohibited by it to the states, are reserved to the states, respectively, or to the people." *Ex parte Merryman*, C.C. Md. 1861, Taney U.S. 246, 17 Fed. Cas. No. 9, 487.

U. S. government has no powers except those expressly given or given by necessary implication. Within their individual spheres, state and national governments are as sovereign as if they were two independent foreign states.

Commonwealth v. *First National Bank & Trust Co. of Easton*, 1931, 154 A 379, 303 Pa. 241.

G. P. 174, U. S. Pa. — The dignity of the United States Government will not permit conviction of any person on tainted testimony. *Misarash* v. *U. S.*, 77 S. Ct. 1.

Jan. 1957, West's Fed. Digest, p. 124 — C.A. Kans. — The term "discretion" when used as a guide to judicial action, means sound discretion exercised with due regard for that which is right and equitable under the circumstances, and means discretion directed by reason and conscience to a just result, and it frequently involves painstaking consideration by many factors, giving to each the weight to which it is appropriately entitled. *Atchinson, T. & S. F. Ry. Co.* v. *Jackson*, 235 F 2d 390.

D.C.N.C. — Sound judicial "discretion" is not synonymous with will or whim of judge, and rather should will be of the law. *Morrissey* v. *Crabtree*, 143 F Supp. 105.

Judicial power is never exercised for the purpose of giving effect to the will of the judge, always for the purpose of giving effect to the will of the legislature, or in other words, to the will of the law. *Osborn* v. *Bank of United States*.

Fed. Digest Criminal Law, vol. 24, p. 119 — C.C.A. La. 1922 — A defendant admittedly not present at the commission of a crime, can be convicted as an accomplice only on conviction of those directly charged with it's commission, and is prejudiced by an error which renders their conviction illegal. *Falgout* v. *U.S.* 279 F 513.

Assuming that the statute prohibiting the interception of telephone communications does not apply to intrastate communications. It is necessary to render evidence obtained by wiretapping competent, to show the interstate character of the communications and the burden is on

the party offering the evidence. Communications Act of 1934 605, 48 Stat. 1064, 1103, 47 U.S.C.A. 605.

Various Attorneys General have advanced an interpretation of section 605 of the Federal Communications Act which distinguishes between "intercepting and divulging" telephone communications. According to this construction intercepting alone constitutes no offense; there must also be a devulging. Thus, when agents, Jones and Johnson tap a telephone, make a recording on wax discs or make a recording on wax discs or tape and attach written summaries, deliver these to their immediate superiors who in turn examine the interceptions and summaries in department files from which information may be voluntarily proffered to other federal Agencies and Bureaus. No aspect of this course of action is interpreted as constituting a divulging of the contents of an intercepted communication.

Not only have the New York courts specifically sanctioned the divulgence of telephone conversations intercepted under the provisions of Section 813-a of the New York Code of Criminal Procedure but they have also permitted divulgence of telephone communications intercepted without sanction of any specific statute. For example, see *People* v. *Applebaum* (2nd Dept., 1950), 277 App. Div. 43, affirmed 301 N.Y. 728; *Erlich* v. *Erlich* (1st Dept., 1951), 278 App. Div. 244.

The defendant therefore contends that Congress under the guise of regulating interstate and foreign communications cannot legally condemn as criminal what the State Constitution, Statute and Courts specifically allow.

The Government having failed to prove that the Federal Communications Commission had requested the institution and prosecution of the instant proceeding, defendant's Motion for a Direction of Acquittal should have been granted.

Subdivision (c) of Section 401 of Title 47, United States Code, under the heading of "Enforcement of chapter and orders of commission; jurisdiction", provides as follows:

> "Upon the request of the Commission it shall be the duty of any United States Attorney to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this chapter and for the punishment of all violations thereof, and the costs and expenses of such prosecutions shall be paid out of the appropriations for the expenses of the courts of the United States."

Congress thus provided that no criminal prosecutions could be instituted without specific authorization by the Federal Communications Commission. In view of the myriad technical violations of such Act by Federal prosecutors and agencies and by state authorities, as indicated by reported Federal and State cases, such a Congressional mandate should not be lightly disregarded. And the Trial Court erred in refusing the defendants request for a direction of acquittal.

The indictment was insufficient as a matter of law in failing to set forth that the alleged telephone conversations were interstate or foreign, and the defendant's motion to dismiss it should have been granted.

Prior to trial, the defendant moved to dismiss the indictment as being "insufficient as a matter of law because it does not contain a specific allegation that the telephone communications which were intercepted were interstate or foreign communications".

The defendant here contends, as he did in the Court below, that the *Weiss case* is not applicable to a criminal prosecution because there the Supreme Court decided only

a question pertaining to the non-admissibility of intercepted intrastate telephone communications against the sender in a Federal Court.

CONCLUSION

The government's case conclusively shows that there was no overt act committed by the petitioner, and further shows that there was no intent to violate any law, as the Ohio law was researched, and the Federal Bureau of Investigation was notified, and this is further shown by the fact that the United States Federal Narcotics office was called in on one "tap" and the Cincinnati Police Department on the other "tap."

Petitioner further believes that where the trial judge fails to give the defendant a chance to be heard before sentence is passed, the sentence is void.

It is therefore respectfully submitted that this case is one calling for the exercise of this court of its supervisory powers. The guilty verdict and the decision of the United States Circuit Court of Appeals is erroneous and should be reversed, or in the alternative, a new trial should be granted in the District Court.

Respectfully submitted,

JACK C. MASSENGALE
Attorney for Petitioner.

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communications by wire or radio shall divulge or publish the existence, contents, substance, purport, effect or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *provided*, that this section shall not apply to the receiving, divulging,

publishing or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress.

47 U.S.C. Section 501

Any person who wilfully and knowingly does or causes or suffers to be done any act, matter or thing, in this chapter prohibited or declared to be unlawful, or who wilfully and knowingly omits or fails to do any act, matter or thing in this chapter required to be done, or wilfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided in this chapter, by a fine of not more than $10,000 or by imprisonment for a term not exceeding one year, or both; except that any person, having been once convicted of an offense punishable under this section, who is subsequently convicted of violating any provisions of this chapter punishable under this section, shall be punished by a fine of not more than $10,000.00 or by imprisonment for a term not exceeding two years, or both.

UNITED STATES CONSTITUTION

Article IV, Section 2 – The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

Amendment 6 – In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with

the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment 8 — Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment 9 — The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment 10 — The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CAUSES ARGUED AND SUBMITTED

December 11, 1956 — Before: Simons, Chief Judge, Allen and Stephens, Circuit Judges.

These causes are argued by Charles E. Lester for appellant and by Thomas Stueve for appellee and are submitted to the court.

JUDGMENT

No. 12,926

(Filed February 11, 1957)

Appeal from the United States District Court for the Southern District of Ohio.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Ohio, and was argued by counsel.

On consideraion whereof, it is now here ordered and adjudged by this court that the judgment and sentence of the said District Court in this cause be and the same is hereby set aside as to Count 3 and affirmed as to Count 5 of Indictment No. 8874, and the case is remanded for further proceedings not inconsistent with the opinion filed herein.

JUDGMENT

No. 12,927

(Filed February 11, 1957)

Appeal from the United States District Court for the Southern District of Ohio.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Ohio, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment and sentence of the said District Court under Indictment No. 8875 be and the same is hereby affirmed.

OPINION

(Filed February 11, 1957)

Nos. 12926-27

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

JACK C. MASSENGALE,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the District Court of the United States for the Southern District of Ohio, Western Division.

Decided February 11, 1957.

Before SIMONS, Chief Judge, ALLEN and STEPHENS,* Circuit Judges.

PER CURIAM. Defendant-appellant, hereinafter called defendant, was charged in the District Court of the Southern District of Ohio under counts 1, 2, 3, and 4 of Indictment 8874 with violating Title 18 U. S. C., Section 912, on dates specified therein, by falsely assuming and pretending to be an officer and employee acting under the authority of the United States, namely, an agent of the Federal Bureau of Investigation. In Count 5 of Indictment 8874 it was charged that defendant, on or about September 12, 1955,

* Judge Albert Lee Stephens of the Ninth Circuit.

not being authorized by the sender, willfully and knowingly intercepted telephone conversations and divulged their substance to certain persons named, in violation of 47 U. S. C., Section 605 and Section 501. The jury found defendant not guilty on Counts 1, 2, and 4 and guilty on Counts 3 and 5 of Indictment 8874. The single count indictment, 8875, charged a violation of 47 U. S. C., Section 605, that is, willfully intercepting and divulging telephone communications, not being authorized by the sender, upon a date preceding that charged in Count 5 of Indictment 8874. The jury found defendant guilty on the single count indictment 8875. The District Court sentenced defendant to imprisonment for one year and to pay a fine of $750.00 on Count 5 of 8874, and for three years on Count 3 of 8874 (Title 18, Section 912). The sentence on Count 3 was to run consecutively with that under Count 5 of 8874, but sentence under Count 3 was suspended and defendant was placed on probation. Under Indictment 8875 the court sentenced defendant to imprisonment for one year and to pay a fine of $750.00, this sentence running consecutively with that imposed under Count 5 of Indictment 8874.

Defendant contends that the verdict, judgment, and sentence under Count 3 charging false impersonation of a United States officer are supported by evidence so insufficient that the court should have sustained his motion for judgment of acquittal. This motion was made as to all counts of both indictments at the conclusion of the government's evidence and at the conclusion of all the evidence. As to the interception charge, defendant urges that while Title 47 U. S. C., Section 605, prohibits the use in evidence of telephone communications intercepted without authority of the sender, if this statute is construed to cover intrastate communications and carried to a logical conclusion it vio-

lates the constitutional prohibition against abridging freedom of speech. However, this court, in the case of *Diamond* v. *United States,* 108 Fed. (2d) 859, held to the contrary and the Supreme Court in *Weiss* v. *United States,* 308 U. S. 321, sustained the *Diamond* case holding.

Defendant's attack upon the sentence under Count 3, 8874, is more meritorious. We do not discuss any other count than Count 3 of Indictment 8874, because as to Counts 1, 2, and 4 of this indictment the jury found defendant not guilty. The jury found as to Count 3 of Indictment 8874 that defendant, in the presence of Grace Eilert, was guilty of the offense of impersonation of an agent of the Federal Bureau of Investigation. There is no evidence to sustain this finding.

Defendant was an employee of the Federal Detective Bureau, Inc. The evidence as to the transactions alleged to constitute impersonation of a United States officer or agent in no way sustained the charge of the indictment that defendant represented himself to be an agent of the Federal Bureau of Investigation. The badge defendant wore bore the words "Federal Detective Bureau, Inc." Grace Eilert, the witness involved in the charge of Count 3, testified that defendant stated he was from the "Federal Bureau." He gave the witness a telephone number, that of the Federal Detective Bureau, through which defendant was later promptly located. No evidence was presented that defendant at any point declared himself to be an agent of the Federal Bureau of Investigation or that defendant assumed and pretended to be an officer or employee acting under the authority of the United States.

The judgment and sentence under Count 3 of 8874 are set aside. The judgments and sentences under Count 5 of 8874 and under Indictment 8875 are affirmed.

The cases are remanded to the District Court for further proceedings not inconsistent with this opinion.

ORDER DENYING REHEARING

(Filed March 19, 1957.)

The petition for rehearing is denied.